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Filed Dec. 18, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

Case No.

Term No. 261.

ROBERT RAE, Jr., et al.,

vs.

Plaintiffs in Error,

HOMESTEAD LOAN AND GUARANTEE COMPANY,

Defendant in Error.

} Writ of error to the
Supreme Court
of Illinois.

PLAINTIFFS IN ERROR REPLY TO MOTION OF DEFENDANT
IN ERROR TO DISMISS FOR WANT OF
JURISDICTION OR AFFIRM,

—BY—

ROBERT RAE,

SOLICITOR FOR PLAINTIFFS IN ERROR.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1899.

ROBERT RAE, Jr., et al., <i>Plaintiffs in Error,</i> <i>vs.</i>	}	Writ of error to the Supreme Court of Illinois.
HOMESTEAD LOAN AND GUARANTEE COMPANY,		
<i>Defendant in Error.</i>		

**Plaintiffs in Error Reply to Motion of Defendant
in Error to Dismiss for Want of
Jurisdiction or Affirm.**

STATEMENT.

On the 16th day of October, 1896, the defendant in error filed in the Circuit Court of Cook County, in the State of Illinois, its bill in chancery alleging that the plaintiff in error, Robert Rae, Jr., was indebted to the complainant in the sum of four thousand nine hundred dollars (\$4,900) in gold coin of the United States of America, of the then standard weight and fineness evidenced by the bond of the said Robert Rae, Jr., secured by a mortgage or trust deed on real estate in Cook County.

The bill alleged that there was due the complainant at the time of filing its bill, upon the said loan in gold coin of the United States of the present standard of weight and fineness, the sum of five hundred ninety dollars and four cents (\$590.04), being the aggregate of the said several

installments of said loan due and payable as set out in said bill, and interest on the several installments at the rate of 7 per cent. per annum from the dates when they respectively became due. (Rec., 16; page, 214.)

The bill further alleges that it was covenanted and agreed that in case of default for a period of thirty days in making payment on any installment due in accordance with the terms of said bond, * * * then the whole of said sum secured shall at once, at the option of the holder of said bond, become due and payable, without notice to the said party of the first part. * * * And thereupon the bondholder shall have the right to immediately foreclose this trust deed. (Rec., 12; Abst., 11-12.)

The bill further alleges that the complainant by reason of the default in the payment of the said several installments due upon said loan, has elected to declare the entire amount of the said loan due and payable, as by the terms of said bond and trust deed it has the right to do.

The bill then concludes with a prayer that upon the hearing the court will ascertain upon an accounting how much is due the complainant under the terms of said bond and trust deed, and will decree the payment of any amounts so found due, by a short day, *in gold coin of the United States*, of the present standard weight and fineness. Prays in default of payment that the property will be sold.

The bill, in short, claims that there is \$590.04 due on the coupons in gold coin of the United States of the present standard, etc., and by reason of the non-payment of this amount in gold coin it claims that the principal sum shall be declared by the court due, and prays that the court that

this amount, together with the amount due on the coupons, be decreed to be found due and payable in gold coin of the United States of the present standard weight and fineness. No allegation is made that the borrower was paid in gold coin. The only demand made is that of gold coin for moneys due on the coupons and principal sum.

The plaintiffs in error appeared and filed their demurrer to the bill and set forth the following causes of demurrer. (Rec., 17.)

(1.) The matters and things set out in the complainant's bill are contrary to public policy and void.

(2.) Because it is not lawful for the complainants and the defendants to make any money but gold and silver money a money tender in payment of any debt contracted in the United States, to be paid in the United States.

(3.) That so much of the act of congress of February 28, 1878, entitled "An act to authorize the coinage of the standard silver dollar, and to restore its legal tender character," which provides that gold and silver money of the United States shall be legal tender for payment and discharge of debts and obligations is valid, but the proviso permitting parties to make such special contracts as they please as to the payment of debts and obligations in money other than gold and silver is void.

(4.) That the contract or mortgage set forth in said bill and the relief prayed therein is void as against public policy.

(5.) That by virtue of article 1, section 8, paragraph 5, of the constitution of the United States, congress alone has "power to coin money and regulate the value thereof," and that by article 1, section 10, paragraph 1 of said constitution, it is provided that "no state shall coin money, emit bills of credit or make anything but gold and silver

coin a tender" in payment of debts in contracts made in the United States to be performed in the United States. Said defendants claim jointly and severally the benefit of said constitutional provisions.

(6.) That the bill should be dismissed for want of equity.

The demurrer was overruled by the Circuit Court and the complainant, not amending his bill, but still insisting upon gold coin of the United States as the only medium of payment, plaintiffs in error elected to abide by their demurrer and refuse to answer over.

Thereupon, on February 15, 1897, without any evidence, so far as the record shows to support it, a decree of foreclosure was entered finding that the plaintiffs in error were indebted to the defendant in error in the sum of five thousand eight hundred fifty-seven dollars and seventy-six cents (\$5,857.76), and decreeing that unless said sum was paid within five days the premises described in the mortgage should be sold.

Plaintiffs in error thereupon appealed to the Appellate Court of the State of Illinois and made assignment of errors (Rec., 22; Folio, 23), the following of which are some of them:

(3.) The court erred in not dismissing said bill for the several reasons set up in said demurrer.

(4.) The court erred in not dismissing said bill because said bill claimed that there was due the said complainant the sum found to be due the complainant by the terms of the mortgage and bond, in gold coin of the United States, of the present standard of weight and fineness.

(5.) The court erred in decreeing the whole sum, principal and interest, due at the election of the complainant,

because the defendants had not paid the interest in gold coin of the United States of the present standard of weight and fineness.

(6.) The court erred in sustaining the complainant's bill because said bill averred that the defendants became indebted to the complainant in the sum of four thousand nine hundred dollars (\$4,900) in gold coin of the United States of America, of the standard weight and fineness, without alleging that said defendants received such gold coin of the complainant.

(7.) The court erred in sustaining complainant's bill on the allegation that there is now due upon said loan, in gold coin of the United States, of the present standard of weight and fineness, the sum of five hundred ninety dollars and four cents (\$590.04), being the aggregate of the said several installments of said loan due and payable as aforesaid; also, there is due on said loan four thousand five hundred nineteen dollars and forty-four cents (\$4,519.44), in accordance with the terms of said mortgage.

The decree was affirmed by the Appellate Court (76 Ill. App. Rep., 548), the court erroneously holding that the points raised were not open questions for it, as the validity of gold bonds is settled by the Supreme Court of Illinois in the case of *Bedford v. Woodford*, 158 Ill., 122. The court said:

"It is there held that a contract expressly made payable in gold coin is not void, but is enforceable as made."

From the judgment of the Appellate Court the plaintiffs in error appealed to the Supreme Court of Illinois, and made the same assignment of errors in that court which were made in the Appellate Court. (Rec., 26.) The Su-

preme Court affirmed the decree of the Circuit Court. The opinion is reported 178 Ill., 369, and shown in the record on page 30.

The Supreme Court held in substance that the decree of the Circuit Court did not require payment in any particular kind of money, and, therefore, the plaintiffs in error were not prejudiced by the decree; that even if the character of money in which payment was contracted to be made should be rejected from the contract, nevertheless the plaintiffs in error were liable to pay in some kind of legal tender.

From this judgment of the Supreme Court of Illinois plaintiffs in error have sued out the present writ of error.

ASSIGNMENT OF ERRORS.

First. The Supreme Court of Illinois erred in affirming said judgment and decree of the Appellate Court for the First District, affirming a decree of the Circuit Court of Cook County, in the State of Illinois; which said latter court overruled plaintiffs in error's demurrer, filed in the said Circuit Court of Cook County on the 11th day of February, A. D. 1897, to the said then complainant's bill, and entering a decree *pro confesso* for the principal sum and interest claimed to be due and payable in gold coin of the United States on the allegation of the bill, against the provisions of the acts of congress in such cases made and provided.

Second. The said court erred in not reversing said decree of the said Appellate Court and said Circuit Court of Cook County in sustaining the demurrer to said bill and in not dismissing said bill for want of equity.

Third. The state court erred in not dismissing said bill for the several reasons set up in said demurrer.

Fourth. The court erred in not dismissing said bill because said bill claimed that there was due said complainant the sum found to be due complainant by the terms of the mortgage and bond, in gold coin of the United States of the present standard of weight and fineness.

Fifth. The court erred in enforcing a forfeiture in decreeing the whole sum, principal and interest, due at the election of the complainant because the defendants had not paid the interest coupons in gold coin of the United States of the present standard of weight and fineness.

Sixth. The court erred in sustaining the complainant's bill, because the said bill averred that the then said defendants became indebted to the complainant in the sum of four thousand nine hundred dollars in gold coin of the United States of America, of the then standard weight and fineness, without alleging the then defendants received such gold coin of the complainant.

Seventh. The court erred in sustaining the then complainant's bill on the allegation that there was then due upon said loan, in gold coin of the United States, of the present standard of weight and fineness, the sum of five hundred and ninety dollars and four cents (\$590.04), being the aggregate of the said several installments of said loan due and payable as aforesaid; also that there is due on said loan four thousand five hundred and nineteen dollars and forty-four cents (\$4,519.44), in accordance with the terms of said mortgage.

ARGUMENT.

I.

THE DEFENDANT IN ERROR MAKES ITS MOTION THAT THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE NO FEDERAL QUESTION IS INVOLVED.

It appears from the record, which embraces also the assignment of errors in the Appellate Court, and those, also, in the Supreme Court of Illinois, and in the opinion of the Supreme Court of Illinois, that a federal question is involved. Of course, the assignment of errors in this court is no part of the record.

The case of *Woodruff v. Mississippi*, 162 U. S., 291, is decisive of this point.

The plaintiffs in error claim by their demurrer filed to the bill that under the constitution of the United States, and the statutes of the United States, that they were not bound to pay an alleged indebtedness in gold coin of the United States, and default of their doing so made liable to pay a much larger sum than then due, in gold coin of the United States, and that any demand made upon them for such failure to pay in gold coin upon such grounds in a court of law, in a state court, if successful, would be the denial by such state court of a right, title, privilege or immunity guaranteed to them in the federal constitution, though the amount decreed by the court for the penalty should be in lawful money of the United States. Furthermore, a disregard of any of the provisions of the constitution of the United States, or of the statutes thereof, or authority exercised under the United States by a state court when invoked for construction or protection, is in effect a decision

against the validity of such constitutional or statutory enactments, and, the case falls within articles first, second and third of sections 709 of the Revised Statutes of the United States.

The first and fourth grounds of the demurrer are, that the contract or mortgage, the matter set up in the bill, and the prayer of the bill, are contrary to public policy and void. The second ground of demurrer is, that it is not lawful for the complainant and defendants to make any money, but gold and silver money, a tender in payment of a debt contracted within the United States, and to be paid within the United States. As paper money is not involved in the case, no reference is made to it.

It is contended on behalf of the defendant in error, that the public policy referred to in the demurrer, has reference to the public policy of the State of Illinois, and not of the United States, and to sustain this, they rely on *Kipley v. Illinois*, 170 U. S., 182.

It is hardly a controvertible proposition that, that public policy, which the United States government exclusively possesses, must always be not only its policy, but the policy of the several states, and if the United States has exclusive jurisdiction over the coined money of the United States, which we contend it has, an allegation that a contract made in reference to such coined money as currency, being contrary to public policy, must be directly referable to its public policy, and not to a state public policy, adopted by state constitution or statutes made under it.

The first assignment of error, together with the fourth, are characterized by the second, third and fifth assignment of errors, which all have reference to, either the constitution of the United States, or acts of congress passed under it.

It has been decided after solemn argument before this court in an exhaustive and elaborate opinion, delivered by this court in the legal tender cases, in the opinion delivered by Mr. Justice STRONG, in which it is said:

"It was designed to provide the same currency, having a uniform legal value in all the states. It was for this reason the power to coin money and regulate its value was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was *withdrawn from the states*. The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in congress. If the power to declare what is money is not in congress, *it is annihilated.*"

Knox v. Lee, 12 Wall., 310.

See also *Veazie Bk. v. Fenno*, 8 Wall., 533.

Guilliard v. Greeman, 110 U. S., 421.

It is needless to multiply authorities on this subject. All the cases which have gone up on writs of error to this court from the state courts, involving the currency laws, have simply raised the question of the right to demand gold and silver, or the right to refuse to pay it, or in a case asking affirmative relief, to tender something else other than gold or silver, notwithstanding the contract may call specifically for gold and silver.

The cases discussed in another part of this brief make this plain. This is the only case in the United States where a creditor has demanded gold coin and nothing but gold coin, notwithstanding the act of congress denies to its courts the power to grant any such specific relief.

The act of 1893 of congress, passed before this contract was made, requires all judgments in the federal courts to

be in dollars and cents. This is some evidence of its public policy on this subject.

In England there is a case where a British subject demanded cash instead of the bank notes of England, raising a question of law of the provisions of 37 George III., c. 45. The case is reported as *Grigby v. Oakes et al.*, 2 Bos. & Pul., 526. Chief Justice Lord Alvanley, in deciding the question, in speaking of such a creditor making such a demand, said:

"Thank God, few such creditors as the present plaintiff have been found since the passing of the act."

It will be seen in the argument that follows, that article 1, section 8, paragraph 5, of the constitution of the United States, authorizes congress, by an irresistible inference, not only to coin money and regulate the value thereof, but to pass legal tender acts which alone authorize creditors to demand money, and debtors to tender it, in satisfaction of debts and obligations.

The public policy of the United States is usually to be found in its acts of congress, and when clearly declared in any such act is obligatory upon her courts.

U. S. v. Trans. Miss. Freight Co., 160 U. S., 290.

After the act of February 28, 1878, commonly known as the Bland act, and which restored the legal tender quality of silver dollars, congress, on the 12th of July, 1882, passed an act which provided that no national bank should be a member of a clearing house at which gold and silver certificates were not accepted in payment of balances. This is some evidence of its public policy in this respect.

Prior to this contract of bond and mortgage between

plaintiffs and defendant in error, the act of congress of November 1, 1893, was passed. The act provides:

“And it is hereby declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. And it is hereby further declared that the efforts of the government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts.”

The acts of congress of 1890 and 1893 declare the whole policy of the government on this subject. The language is clear and explicit, and controls the act of 1878 as to the power of citizens to, by express contract, to stipulate for other than gold and silver and greenbacks as a legal tender.

The contract is to be governed by the Acts of Congress in existence at the date of its execution, which acts declared that the policy of the United States is to continue the *use* of both gold and silver as standard money.

The act of November 1, 1893, was passed after great deliberation and care on the part of congress, and was a redemption of the pledges of both of the great political parties of the United States, made in the presidential canvass of 1892.

The Republican National Convention said:

The American people, from tradition and interest, favor bimetallism, and the Republican party de-

mands the use of both gold and silver as standard money, with such restrictions and under such provisions, to be determined by legislation, as will secure the maintenance of the parity of values of the two metals, so that the purchasing and debt-paying power of the dollar, whether of silver, gold or paper, shall be at all times equal. The interests of the producers of the country, its farmers and its workingmen, demand that every dollar, paper or coin, issued by the government, shall be as good as any other.

We commend the wise and patriotic steps already taken by our government to secure an international conference to adopt such measures as will insure a parity of value between gold and silver for use as money throughout the world.

The Democratic National Convention said:

We denounce the Republican legislation known as the Sherman act of 1890 as a cowardly make-shift, fraught with possibilities of danger in the future which should make all of its supporters as well as its author, anxious for its speedy repeal. We hold to the use of both gold and silver as the standard money of the country, and to the coinage of both gold and silver without discriminating against either metal or charge for mintage; but the dollar unit of coinage of both metals must be of equal intrinsic and exchangeable value, or be adjusted through international agreement, or by such safeguards of legislation as shall insure the maintenance of the parity of the two metals and the equal power of every dollar at all times in the markets and in the payment of debts; and we demand that all paper currency shall be kept at par with and redeemable in such coin.

We insist upon this policy as especially necessary for the protection of the farmers and laboring classes, the first and most defenseless victims of unstable money and a fluctuating currency.

The platforms of the two parties in 1896 show no signs of a change of policy, but reaffirm the policy declared in the act of 1893. On these propositions, ten

millions of votes were cast in approval. It will be seen that the act of 1893 follows these resolutions almost *hæc verba*. In the very front and forward of the act it is declared to be the policy of the United States to continue the *use* of both gold and silver as standard money, and a promise follows in its wake, that the efforts of the government should be so steadily directed * * * as will maintain at all times the equal power of every dollar coined or issued by the United States in the *markets*, as well as in the payments of debts. The word "*use*" in the act was evidently inserted *ex industria*. Congress could not have been unmindful of the history of the efforts of governments to maintain money in use in civilized countries for centuries.

A few illustrations will suffice to show the difficulties all governments have met, in inducing their peoples to use the government's currency, even coined money. As early as 1611, acts were passed in England under King James' 1st reign, authorizing the coining of money and compelling the people to take it. During the French revolution France, in 1787, in her "Assignats," legislated for their forced circulation. The French kings had passed laws compelling the Canadas, when part of her possessions, to receive a certain metallic currency.

The federal congress of revolutionary times, in January, 1776, attempted, under severe penalties, to compel the people to receive the currency then issued. Again, in 1862, when the country was in a condition of civil war, the money lenders and changers of Wall and Nassau streets and in New England, refused to use part of the currency of the United States, and by a refusal to use other than gold coin as money ran it to an exorbitant premium, and denied to the debtor the

right to pay in other currency than gold of the United States, his debts and obligations. Hence congress, responsive to the unanimous voice of the people, adopted their respective platforms, which declared that both gold and silver as standard money should be continued in its *use*, and maintained at a parity, and this use was to be in the markets, which means in commerce, barter and sale, in borrowing and lending; and in order to do this both gold and silver were made a legal tender for debts, both, public and private.

The present congress, recently assembled, have introduced a bill in both houses to preserve silver in equal use with gold, and at a parity in value. It is not intended that the legal tender quality of silver should be repealed, but kept on a parity with gold. It may be that the notorious fact that creditors demanded gold and refused silver, thereby decrying it, was one of the efficient causes which led up to this new legislation and became necessary, among other reasons, in order to keep silver both in its use and value at a parity with gold. Mr. Chase, when secretary of the treasury, in his report to congress, in speaking of the paper legal tender, says:

"Unfortunately, there are some persons and some institutions which refuse to receive and pay them (greenbacks), and whose action tends not merely to unnecessary depreciation of the notes, but to establish a discrimination, etc."

All this question as to the public policy of the federal government in the regulation of money under the constitution and these acts of congress, raises a federal question over which this court has in litigation jurisdiction, and the motion ought not to prevail.

II.

THE MOTION OF THE DEFENDANT IN ERROR THAT THE
JUDGMENT OF THE SUPREME COURT OF ILLINOIS
SHOULD BE AFFIRMED.

The ground for this motion is, that the law is settled by the decisions of this court in *Bronson v. Rhodes*, and *Trebilcock v. Wilson*, that contracts calling for payment in any legal tender money of the United States are valid, and cannot be fulfilled by the tender of money other than that specially mentioned.

Neither of these cases were decided under the act of 1893. The cases were those of gold and silver under the act of 1837, and no discrimination was made against either metal. Hence no such question as a discrimination was before the court, and that the language used in the opinion must be referable to the matter in controversy. To show that every one of the questions raised in this case, have never been considered or settled by this court, will be the endeavor of the following argument. We may say, however, that as the briefs of the plaintiffs in error and defendants in error cover the whole case, the court may feel at liberty, if it so desire, to either affirm or reverse.

Leeper v. Texas, 139 U. S., 468.

That the contract entered into, which is the subject of this litigation, was in contravention to, and an impairment of the declared policy of the government of the United States to continue the use of both gold and silver as standard money, and calculated to embarrass the efforts of the government to establishment of such a safe system of bimetallism as would at all times maintain the equal power

of every dollar coined or issued by the United States, in the markets and in the payment of debts, no intelligent jurist or statesman can doubt. The market value of silver may, by commercial conditions, fall. This the government must meet. In addition to this burden, the creditor who insists on rejecting its use as currency, may also cause it to fall in value, and by so doing, places an *additional difficulty in the way of government*, to keep its promise to establish a system as will maintain at all times the equal power of every dollar coined in the market, and the payment of debts, which is against public policy.

Let us write the act and promise in the contract and see.

Whereas, by the Acts of Congress of July 14, 1890, and November 1, 1893, it is provided as follows :

"And it is hereby declared to be the policy of the United States to continue the *use* of both gold and silver as standard money, such equality to be secured by such safeguards of legislation as will insure the maintenance of a parity in the value of the two metals, and the equal power of every dollar at all times in the markets, and in the payment of debts;" and,

"Whereas, it is hereby declared to be the policy of the promisee in this country to discontinue the use of the silver dollar as standard money, and that the equal power of every such silver dollar at all times in the markets shall be no longer maintained, or its parity with gold coin be kept in the payment of debts, the promisor hereby promises to pay the debt created by this contract in gold coin only, to said promisee, and in case he so fails to pay any installment of said debt, the promisee shall have the power, given in a mortgage to secure this contract and debt, to declare the whole principal sum to be due in gold coin, and shall have the power to apply to a court of equity to foreclose the mortgage and to sell the mortgaged property through the aid of a court of equity sitting in one of the courts of the United

States where said property is situated, nothing in said Acts of Congress to the contrary, notwithstanding."

Would any such court lend its aid, in the teeth of the declared policy of its government, in giving indulgence to the covenanted policy of the promisee to in this way abolish the use of both metals in the payment of debts, and give a preference against the declared policy of the government to gold coin over silver for this purpose?

The answer is plain. "Not one." The court would say:

"The courts of equity were not established to enforce contracts contrary to public policy—a policy declared by the constitutional legislature on the subject-matter, which is intrusted by the people of the United States exclusively to said legislature."

It is complained by the appellee that no case is quoted by the appellants to sustain the assertion that such contracts are contrary to public policy. The courts generally find what is or is not public policy from the legislation of the country, and follow in its wake. It is not necessary that a court should so decide. Congress has acted, and it has declared what the public policy on this subject is.

United States v. Trans. Miss. F. Assn., 160 U. S., 290.

Barnes v. Stoddard, 117 Ill., 243.

Female Academy v. Sullivan, et al., 116 Ill., 382.

Stevens v. Pratt et al., 101 Ill., 229.

Stevens v. Pratt et al., *Id.*, 214.

Stevens v. Pratt et al., *Id.*, 212.

U. S. Mortgage Co., 93 Ill., 492; 83 Ill., 27.

U. S. Mort. Co., 73 Ill., 144.

Slackwater case, 72 Ill., 55.

The Town of Laenna, 67 Ill., 568.

Mr. Justice FIELD, in his opinion in the case of *Woodruff v. Miss.*, 162 U. S., 291, which is a concurring opinion in the reversal of the case, and a dissenting opinion so far as the reasons given by the majority of the court are concerned, admits that if it is against public policy or good morals for the creditor to select one of a class of currency in preference to another, then a contract violating such public policy would be void.

If this opinion had any other weight than that given to it by the high judicial standing of the learned justice, it could be used in favor of the appellants in the present case, for this contract was made after the public policy of the government was so solemnly declared by two Acts of Congress.

The contract is *ex turpi*, and as such this appellee has no standing in court. A court of equity will not lend its aid to either party, not on account of the appellants, but on account of such an appellee.

The purposes of this brief are to demonstrate and make plain :

1. That the Federal Government itself has not conferred on it, by constitutional enactment, in express terms, to do more than to "coin money and declare the value thereof."

That the Supreme Court of the United States has raised by judicial legislation an implied power on the part of the general government, to pass legal tender acts, by virtue of the inherent sovereignty of the general government, as an attribute of that political entity.

2. That if this is so, then the power does not lie in cession or grant to a private individual, any more than any power which a government holds as such to be exercised *pro bono publico*.

3. That the Acts of Congress of 1792, 1837, 1878 and 1893, declare that gold and silver should as currency be *equipolent*, and for private individuals to make gold coin only, by private contract, a legal tender, for the payment of debts and the discharge of obligations, contravenes the clear intent of the government to keep silver on a parity with gold, and is unauthorized by the Constitution of the United States.

4. The question is not whether Congress or the states by enactment may provide for a single standard, but whether Congress, by virtue of the sovereignty of the United States, has the implied power in making currency a legal tender to delegate this implied power to the *citizen* of the several states who is not a sovereign, to create by contract a single standard, whether it be gold or silver, to be used as currency in payment of debts and the discharge of obligations.

5. That while a party can lawfully make a contract, which may be satisfied by the tender of gold bullion, or goods, wares and merchandise, it is contrary to provisions of the federal constitution and against the public policy of the government, that the lawful currency of the country should be regulated by its citizens, or foreigners commorant within its territory.

That the people have confided by organic enactment that the currency shall be created, and its value fixed by the supreme power of the state.

That the making of money and the regulation of foreign money, which means gold and silver, is confided to the general government, and to it only.

6. That the provision in the Act of 1878 which provides that the silver dollar shall be a legal tender for all

debts and dues, public and private, except where otherwise expressly stipulated in the contract, means that the citizen is left perfectly free in the transactions of commerce and traffic to provide by special contract and stipulation that all debts and obligations created therein may be satisfied by tender of the thing contracted for and to be delivered, such as bullion, goods, wares and merchandise, but he shall not expressly provide for one of any class or kind of currency; but it was not intended to delegate to the citizen the power to discriminate against the kinds of currency of the United States, for if they could reject one, they might both, and thus hold the debtor class and the government at the tender mercies of the creditor, foreign or domestic. That if a contrary construction is given to the act this provision was repealed by the act of July 14, 1890, and first of November, 1893, which pledged "the efforts of the government to a system of bimetallism."

7. That the power to make legal tender conferred upon the legislature as a general law cannot be delegated by that department to any other person, body or authority.

8. That to deal in gold dollars to the exclusion of silver dollars as a discharge of debts, affects the currency, by giving a preference to one class of the currency over another, when it is the declared public policy of the government that no such discrimination be made.

9. That contracts between the citizens of the United States to be performed in the United States, whereby a discrimination is made between gold and silver, is against public policy, and as a consequence, void.

10. That a contract to pay in gold coin to the exclusion of silver is void on the ground of public policy, as evinced by the constitution and by the several acts of

Congress regulating *the currency*, and that a mortgage given to secure it is also void, but whether the defendant in error could recover lawful money of the United States in an appropriate action, for money had and received by the plaintiffs from the defendant, does not arise in this case.

It may be said in passing that the plaintiffs would not in the event of such an action seek to avail themselves of the unlawful contract, which is here the subject of defense. The defendant, however, here insists in this proceeding that the plaintiffs shall pay in gold coin to the defendant not only the coupons, but the principal sum, which is payable in ten years from the date of the mortgage, and was not due at the time of filing its bill, unless their failure to pay the coupons in gold gave the defendant the right to make it so.

The defendant insists by way of pledge upon having a special preference prejudicial to general creditors, and its right, if any it has, must be construed *stricti juris*.

The demurrer points out as a fatal objection to this proceeding that the defendant's right is based upon an unlawful contract. This being so, a court of equity will not lend its aid either to enforce such a contract and especially to declare forfeitures under it, and will not, if it has the power, change or modify the contract found to be void on the grounds of public policy so as to make it a new and different one, innocuous and free from such illegality.

The courts will not vary the contracts or the contract relation of individuals, and it is doubtful whether the courts would have the jurisdiction so to do. It is only for the court to say that the contract is valid or void, and if

void there cannot be a decree of foreclosure, or that the plaintiff pay the sum mentioned therein in any kind of money.

Miller v. Taylor, 58 N. Y., 478.

11. That a bill in chancery to foreclose a mortgage on account of the non-payment of one or more of its coupons in gold coin and asking a decree that the penalty for a failure so to do be by decree inflicted, anticipating the payment of the whole principal sum, is invasive of the federal Legal Tender Acts, which make all debts and obligations payable in lawful currency of the United States, and is contrary to the statute which prohibits the courts of the United States from making any money decree in other than lawful currency of the United State, and a demurrer to such bill on these grounds being overruled, works a manifest injury to the plaintiffs in error.

12 The plaintiff's demurrer, which specially points out, and raising all these questions being overruled, and the plaintiffs electing to stand by their demurrer, the defendant, without amending its bill, elect to stand by its demand for a judgment in gold coin for both principal and interest on account of the non-payment of the coupons in gold coin; the judgment on the demurrer is a final judgment.

Clearwater v. Meredith, 1 Wall., 26.

Alley v. Nott, 111 U. S., 472.

No subsequent proceedings in default, in which the court gives judgment on these pleadings in lawful money which has never been demanded or prayed for, can deprive the party of a right to have this final judgment on demurrer reversed, and it is no good answer to

say that the subsequent proceedings, of which there is no certificate of evidence preserved in the record, being lawful, the plaintiffs suffered no injury by overruling their demurrer and on default declaring the principal and interest be paid in lawful money of the United States.

Prior to the case of *McGoon et al. v. Shirk*, 54 Ill., 409, it had been decided in the State of Illinois in the cases of *Hull v. Kohlsaat*, 36 Ill., 30; *Whetstone v. Colley*, 36 Ill., 329, and *Humphrey v. Clement*, 44 Ill., 299, that a contract payable in gold and silver and which did not embrace greenbacks, could be paid in any lawful currency of the United States which might be at the time a legal tender, to wit: gold and silver and greenbacks. That the citizen could not lawfully distinguish between the classes of currency made legal tender by the Congress of the United States.

After these decisions were made in the State of Illinois, the Supreme Court of the United States, in the cases of *Bronson v. Rhodes*, 7 Wall., 229, and *Butler v. Horwitz*, *id.*, 258, which arose out of contracts payable in gold and silver, to the exclusion of greenbacks, decided that the act of 1862, making greenbacks a legal tender, did not interfere with or modify the prior acts of 1792 and 1837, which provided that gold and silver should be a legal tender, and hence the citizen might discriminate between the legal tender of gold and silver, and the legal tender of greenbacks, and give a preference to that of gold and silver coin over that of paper money, to wit: greenbacks; but did not and could not, as the question was not before it, decide that the citizen might discriminate between gold and silver, the contracts which were *contestatio litis*, as the contracts involved, were made payable in gold and silver.

Prior to these decisions the Supreme Court of Illinois laid it down with no uncertain tone, as a cardinal and fundamental principle, that the money with which the citizen could discharge any indebtedness he might owe to the government, was equipolent for the payment of his private obligations, and that a creditor could not determine even by contract which particular kind of currency he would accept from the debtor. In other words, that what the government had declared to be legal tender was legal tender, and that an individual would not be allowed to decide as to what form of legal tender he would accept. In this view the Supreme Court was not singular. Some thirteen Supreme and Appellate Courts of the several states had so decided.

After the decisions of the Supreme Court of the United States in *Bronson v. Rhodes*, and *Butler v. Horwitz*, the Supreme Court of the State of Illinois, recognizing the doctrine that in construing an act of congress the decision of the Supreme Court of the United States furnishes the controlling authority, overruled its prior decision in the case of *McGoon et al. v. Shirk*, 54 Ill., 409, and followed the federal decisions deciding that gold and silver might be lawfully contracted for to the exclusion of greenbacks, as the act creating the legal tender quality of greenbacks, was not intended to interfere with the prior acts making gold and silver legal tender, and as such, citizens could make their contracts solvable in such.

As it was said in this brief, *Bronson v. Rhodes* and *Butler v. Horwitz* were both cases where the contract sued on required that the moneys were payable in a certain sum in gold and silver coin, lawful money of the United States, and while it was held parties might avail themselves of the

legal tenders created under the Act of 1837, and stipulate for gold and silver, but not for either alone, the constitutionality of paper legal tenders was sustained by a divided court.

These two cases were subsequently followed in the Supreme Court of Illinois in the case of *Bedford v. Woodford*, 158 Ill., 122, also a case of gold and silver, as was the case of *McGoon v. Shirk*, *supra*.

The case of *Belford v. Woodford* was a case for the enforcement of a California judgment in the courts of Illinois and which led to a review of the various judgments rendered by the Supreme Court of Illinois, in which the question of gold contracts arose. The California judgment, rendered by the Supreme Court of San Francisco in 1893, decided that the plaintiff recover the amount of the judgment with interest, "to be paid in United States gold coin." It was contended by counsel for the judgment debtor that a judgment calling for payment "in U. S. gold coin" is in no respect different from a judgment calling for a certain amount of gold bullion; that without evidence showing the mercantile value of the quantity of gold called for, it would be impossible for the court or the jury to determine what, in fact, was the obligation fixed by the judgment, as gold coin is constantly fluctuating in value.

The pleader had simply averred that the judgment was for dollars and cents, and when he introduced the California judgment, payable in United States gold coin, a fatal variance was claimed, but the court held that there was no variance, and that the direction as to the payment "in U. S. gold coin" was mere surplusage.

The court came to this conclusion because, upon an inspection of the judgment record, it appeared that the

notes for which the judgment had been rendered were not gold notes, but simply called for payment in dollars and cents, and that the court rendering a judgment by default, went beyond the issue raised by the complaint in ordering the judgment to be paid "in gold coin," and to that extent it was void.

The California judgment, said the court, being in legal effect a judgment for the payment of dollars generally, notwithstanding it was for gold coin, which is to be treated as a nullity, can be discharged in either one of two lawful kinds of money, to wit: either by paying gold or silver coin, or by paying legal tender notes, because the plaintiff, by taking a judgment payable in dollars generally, has waived his right to insist upon payment in United States gold coin. As to waiver this is all *obiter*, as the notes were not payable in gold coin. No inquiry was made by the court as to the effect of the acts of congress of 1890, or 1893.

Acts of Congress of 1792, 1837 and 1862 considered.

The Acts of Congress of 1792 and 1837 provided that gold, and also, silver to the extent of five dollars, should be a legal tender for all debts, public and private. Under the act of 25th of February, 1862, known as the Legal Tender Act, it was provided that the United States greenbacks should perform the same office. This was always regarded as the exercise of a doubtful power by Congress.

Markham v. Hunter, 1 Wheat., 326.

The question presented in the cases of *Bronson v. Rhodes* and *Butler v. Horwitz* was, whether this last act modified and controlled the prior acts making gold and silver the legal tender under the act of 1837, and the Su-

preme Court of the United States decided that the act of 1862 had no such effect.

Bronson and Metz, in December, 1851, entered into a contract stipulating for the payment of that sum in gold and silver coin, lawful money of the United States.

This contract was made under the coinage and legal tender act of 1837, which made gold and silver a legal tender for all debts and obligations.

Rhodes, the promisor, after the Loan and Currency Acts of 1862 and 1863, making greenbacks a legal tender had been passed, tendered to the creditor notes in lieu of gold or silver.

The Supreme Court of the United States held that the contract was to be governed by the act of 1837, and that the promise in the contract to pay in gold and silver ran with, and not against the statute.

In *Butler v. Harwitz*, (7 Wall., 258), the contract was made in February, 1791, and before Congress had made any provision for legal tenders. No such act was passed until 1792, establishing the mint.

The contract was made payable in English golden guineas, etc.

On the 1st of January, 1866, the obligor tendered a sum in gold and silver, American coins, equal to the value to the rent due in guineas. The court held that metallic money of a foreign country, unless Congress has otherwise prescribed, must be treated as bullion, to be ascertained by count, and upon failure to pay, damages should be assessed in lawful money, and judgment rendered accordingly.

In *Trebilcock v. Wilson*, 12 Wall., 687, a note was made in 1861 prior to the Legal Tender Act of 1862,

and was made payable in specie. After the note became due the maker tendered United States notes, made legal tenders under act of 1862, which the holder of the note refused to accept and insisted on payment in gold or silver coin.

The court held, that under the act of 1837, it was lawful to make such a contract, and that the acts of 1837 and 1849 were in force when the act of February 25, 1862 was passed, and were still in force at the time of making this decision in 1872. Being lawful contracts, payable in coin, they must *be* equally capable of enforcement.

The court further held, that the Act of 1862, recognized and distinguished between the two kinds of currency.

The court expressly recognizes that the Act of 1862, was not intended "to interfere in any respect with existing or subsisting contracts payable by their express terms in specie; and when it declares that the notes of the United States shall be lawful money and a legal tender for all debts, it means all debts that are payable in money generally and not obligations payable in commodities or obligations of any other kind."

There is no case adjudged in the Supreme Court of the United States that a contract payable in gold coin only, and which did not also embrace silver, as provided by the Legal Tender Acts of 1878, 1890 and 1893; it was lawful for the parties contracting to discriminate between one metal as against the other after the passage of these acts. The case now before the court is the only case where the question has ever been presented.

The case of *Maryland v. B. & O. R. R. Co.*, 22

Wall., 105, was a contract to pay in money generally. *Trebilcock v. Nelson*, 12 Wall., 687, in gold and silver; *Hyde v. Reclamation Dist.*, 11 U. S., 751, in gold and silver; *Juilliard v. Greenman*, 110 U. S., 421, in gold and silver.

All the decisions that have been made, were made prior to the Act of 1878, and the Acts of 1890 and 1893.

The Act of 1878, as its title implies, is "to restore the legal tender character of silver dollars."

The question can be regarded, then, pretty much as one of first impression.

In determining the question whether Congress can so legislate as to confer upon the citizens of the several states the power to make anything by contract a legal tender which is denied to the several states, we must bear in mind that the Federal government itself has not conferred upon it, by constitutional enactment, in express terms, to do more than to "coin money and declare the value thereof." The Supreme Court has raised by judicial interpretation, an implied power on the part of the general government, to pass legal tender acts by virtue of the inherent sovereignty of the general government, as an attribute of that political entity, and the power is bottomed on no other principle.

If this is so, then, the power does not lie in cession or grant to a *private individual*, any more than any power which a government holds *as such pro bono publico*. It is on this principle that it is held that the submerged lands in a navigable stream are not the subject of private grant, but can only rest in the possession or the cession to a sovereign power.

It has been held that private individuals cannot dis-

criminate to the detriment of the public interest, the legal tender currency of the country.

The acts of Congress of 1792, 1837 and 1878, 1890 and 1893, declare that gold and silver should as currency be equipolent, and for private individuals to make gold only, a legal tender for debts, contravenes the clear intent of the government to keep silver in its use and value at a parity with gold. (See, also, Res. of Senate, 54 Congressional Rec. 1,421, 1876; H. Res., Rec. 379, 55th Congress, 1 session.)

To allow such a discrimination is a detriment to the public interest.

It has been held, that while the government may legally discriminate, INDIVIDUALS may not, and COURTS may not. (1 Hale, P. C. 197.)

It was well said by Judge Wilkes of the Supreme Court of Tennessee,

"that as an original proposition, it may well be doubted whether it is conservant with the highest and broadest public policy to allow individuals to make gold contracts.

"It is said the right to pay in legal tender involves the right to pay in any money that is legal tender, and gold possessing that quality, can be stipulated for; but the error in this is that requiring payment in gold, and in gold alone, deprives the debtor of the right to pay in other legal tender, and compels him to pay in one thing, discriminating against the others, and thus subjecting the debtor to the danger of being placed in a position of embarrassment and peril." When this was said the Act of 1890 and 1893 had not been passed.

The question is not whether Congress or the states may by enactment provide for a single standard, but whether Congress, which only, by virtue of the sover-

eignty of the United States, has the implied power to make anything a legal tender, can delegate this implied power to the citizen, who is not a sovereign, to create by contract a single standard.

The states in which resided originally the power to pass legal tender acts have no such power; this is denied them by constitutional provision.

Congress could not give the states, if they needed such a grant, the power to make anything but gold and silver a legal tender; can it then confer upon the private citizen, through the exercise of an implied power, the power so to do?

The citizen can make a contract to deliver goods, not as the result of a debt or obligation, but as a contract of sale, or of delivery.

If the party does not perform in such a case, the action is on the obligation, and is soluble under the acts of 1879, 1837 and 1878 in the lawful money of the United States.

8 Wall., 1, 44.

U. S. v. N. Bank, 101 U. S., 1.

A judgment for something not lawful money, would be in the nature of a decree for specific performance and not a money judgment.

TO MAKE MONEY AND TO FIX THE VALUE THEREOF IS
A SOVEREIGN POWER.

It was on this ground that Mr. Justice GRAY in *Kinney v. Lee*, (Legal Tender Cases) 110 U. S., 421, in delivering the opinion of the Supreme Court, raises the implied power in the Federal Government. The court says:

"Congress has the power to issue the obligations of the United States, and to impress upon them such qualities as CURRENCY for the purchase of merchandise and the payments of debts as accord with the usage of SOVEREIGN governments. The governments of Europe, acting through their monarch, or the legislature, according to the distribution of powers under their respective constitutions, have AS A SOVEREIGN POWER, a power of issuing paper money and of stamping coin."

Mr Bancroft, in his pamphlet entitled "A Plea for the Constitution," challenges the correctness of this decision as to paper money, founded on an exhaustive historical argument, but grants a plenary concession, that governments alone, can make the medium of exchange, *i. e.*, money, gold and silver, to be used in the purchase of merchandise and the payment of debts.

On the other hand the case of *Hague v. Powers*, 39 Barb., 427, fully supports the opinion of Mr. Justice GRAY, see also *Lick v. Faulkner*, 25 Cal., 405.

To in any way interfere with this currency by counterfeiting it, or debasing it, is made a Federal crime, and it is a common law offense against the several states.

An agreement to pay in merchandise does not deal with, or effect the *currency* of the country, and hence is lawful. Gold and silver as bullion are not lawful money of the United States.

Knox v. Lee, 12 Wall., 311.

Mr. Justice STRONG says:

"There is a wide distinction between a tender of qualities or of specific articles and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation. While contracts for the payment of money are sub-

ject to the authority of Congress * * * and Congress is empowered to regulate that money."

To deal in gold dollars to the exclusion of silver dollars as a discharge of a debt, affects the currency by giving a preference to one class of the currency over another, when it is the declared public policy of the government that no such discrimination shall be made.

Let the foreign money brokers, or the agents of foreign capitalists resident in this country, be armed with the power to deal in this country with its gold dollars only, and we will find the will of Congress and the interest of the commonwealth put at defiance, which declared will is, that gold and silver currency should both be lawful money of the United States with which purchase or pay debts, just as the capitalists of Holland in 1744 put at defiance the legal tender five franc piece of the French crown. * * *

Montesque Spirit of Laws, Vol. II, pp. 62, 63, 64.

No doubt a party can lawfully make a contract, which shall be satisfied by the tender of gold bullion.

But, it is against the public policy of government, that the lawful CURRENCY of the country should be regulated by its citizens, or foreigners commorant within its territory.

Mr. Justice BRADLY, in the Legal Tender cases, says:

"It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the *sword* and the *purse* and the right to wield them without restriction."

The people have confided by organic enactment, that

the currency shall be created, and its value, fixed by the supreme power of the state.

The making of money,, and the regulation of foreign money which means gold and silver, is confided to the general government and to it only.

Veazie Bk. v. Fenno, 8 Wall., 533.

Mr. John Borden of the Chicago bar has recently published a concise and accurate volume on "Value and a Short Account of American Coinage." In it at page 159 he says:

"But it finally become obvious that Congress could not regulate the value of money unless it had the right to regulate its kind and quantity. Whereupon it was finally adjudged (*Guilliard v. Greenman*, 110 U. S., 421), that 'Congress has power to provide a national currency and to secure the benefit of it to the people.' To this end Congress has denied the quality of legal tender to foreign coin, and has provided by law against the imposition of counterfeit and base coin in the community."

In the case of the *Emperor of Austria v. Day and Kossuth*, 3 De Gex, Fisher & Jones, 217, the court says:

"That the regulation of the coin and the currency of every state is a great prerogative right of the sovereign power recognized and protected by the law of nations." (p. 231.)

"The right of issuing currency for the payment of money seems to follow from the *jus cudendae monetæ* belonging to the supreme power of every state."

"This right is not confined to the issue of portions of the precious metals, of intrinsic value according to their weight and fineness, but under it portions of the coarser metals or of other substances may be made to represent varying amounts in value in gold and silver, for which they may pass current." (p. 234.)

"Can it be reasonably doubted that this [Kossuth's Hungarian treasury notes] was meant to be a rival to the present currency in Hungary, wherever it could be brought into competition with it, and that as the new currency gained credit the old would cease to be of any commercial value." (p. 237.)

"It was urged for the plaintiff that the right of coining money, the *jus cudendae monetae*, was universally acknowledged to be a prerogative of sovereigns vested in them for the benefit of their subjects—that this prerogative right extended no less to the creation of paper money than to the stamping of coin—that it was acknowledged by all the nations and recognized by international law, and that, international law being part of the law of England, this court would interfere in favor of rights recognized by and founded upon it. That the right of coining money is the prerogative of the sovereign is laid down by all the writers on international law, and I see no reason to doubt that the prerogative right reaches to the issue of paper money. *Burlamaqui*, (Vol. 3, p. 241), indeed, mentions and treats of it as so extending." 251.

See also Mills Principles, *B. 2, Ch. 1, part 2.*

"I think it is an injury, not to the political but to the private rights of the plaintiff's subjects. What is proposed to be done is to introduce in to the kingdom of Hungary an enormous number of notes which on the face of them, purport that they will be received in the public offices of the state and that they are guaranteed by the state, and which purport also to be signed in the name of the nation by the defendant, Louis Kossuth. That the effect of this introduction will be to disturb the circulation of the kingdom, cannot, in my opinion be doubted; and what will be the effect of that disturbance? Surely to endanger, to prejudice and to deteriorate the value of the existing circulation medium, and thus to affect directly all the holders of Austrian bank notes, and indirectly, if not directly, all the holders

of property in the state. The great authority to which I have referred has very clearly pointed out these consequences. Vattel, book 1, Chap. 10" 253.

It is well said by a great American statesman who was chairman of the Committee on Finance of the United States Senate, that

"money is the creature of the government both as to quality and quantity. It exists merely by the assertion of the law, and in no other way. Article 1, section 8, of the Constitution of the United States, provides that 'The Congress shall have power * * * to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures,' and Section 10 of the same Article denies all such powers to the States, thus making Congress the exclusive creator of money for the American people. Without the action of Congress not one dollar can exist in the United States. If the article called money, whether gold or silver, or paper, is necessary at all in the transactions of life, here alone is the fountain from which it emanates."

If the private citizen has such power he could then make dollars the legal tender, or gold or silver, or *neither*. He could make foreign coin the legal tender, and thus deprive the government of its seigniority and its monopoly of coining money to be used as metallic currency. The revenue derived from this source from 1878 to the close of 1895 equaled \$75,219,137.

The Director of the Mint in his report to the Secretary of the Treasury, 1897, makes it plain that:

The difference to the government resulting from sale instead of coinage would be at least \$83,000,000. Seeing that this bullion is now being made into coin at the rate of more than \$20,000,000 a year without harm to anyone, it would seem to be foolish in the extreme to sell the bullion at such an

enormous loss. The government is not likely to have money "to burn" at such a rate very soon.*

Nay, the capitalists by a general understanding could make gold and silver in spheres, hexagonal, square and oblong, and not in circular flat pieces—the standard currency, and private enterprise might manufacture these, for they would not be of the similitude of the coins of the United States, and hence not within the statutes against private coining, though it might be against the law of the land as decrying the currency of the government.

In short, if, the capitalists had the power to discriminate against the kinds of currency of the United States, they could reject both, and hold the debtor class at the tender mercies of the creditor.

Again Mr. Carlisle says in considering the act of 1879:

"Our power of legislation on this subject will not be exhausted by the passage of this measure and we ought not to halt for a single moment in our efforts to complete the work only inaugurated by it. The struggle now going on cannot cease and ought not to cease until all the industrial interests of the country are fully and finally emancipated from the *heartless domination of syndicates, stock exchanges, and other great combinations of money-grabbers in this country and in Europe.*"

"Appendix Cong. Record, 2nd Session, 45th Congress, page 41."

*The whole quantity of silver bullion purchased under the Sherman law was 168 674,682.53 fine ounces. The total cost was \$155,931,002.25, giving an average cost of 92.44 cents per ounce. Of the whole quantity purchased 53,172,650 ounces had been coined into 68,748,477 silver dollars down to the end of the last fiscal year, and the seigniorage or profit to the government was \$17,216,322. The bullion still uncoined is represented in circulation by Sherman notes of face value equal to the cost of the bullion. At last year's rate of coinage this bullion will be coined in a little more than seven years and Sherman notes will be a thing of the past except in cabinets and as pocket keeps.

It is not for the well-being of society, that this sovereign power for the common good, should be vested in a class of private money changers.

Congress has coined silver dollars and declared the value thereof, and it is not to be tolerated that individuals or the courts will permit by indirection this value to be disturbed by a refusal to accept such silver dollars in the current business of the country.

It is of common knowledge that no farmer, or tradesman, or those needing money, can borrow to-day or the past year, any considerable sum except upon a gold bearing security, especially this is so when secured by a land mortgage. The purpose of this is plain. It is to obtain a chance for the creditors to make a profit in case, by reason of the driving out one class of currency and substituting a single standard, they may force the latter to a premium.

Metropolitan Bank v. Van Dyke, 24 N. Y., 482.

Courts of equity will not tolerate such "hard bargains," nor permit and administer forfeiture of estates, founded on such a thing of evil with all of its oppressive consequences, to the commonwealth.

In January, 1776, Congress declared "that if any person should be so lost to all virtue and regard for his country as to refuse to receive the currency," then issued, "should on conviction thereof be "deemed, published and treated as an enemy of his country and be precluded from all trade and intercourse."

It is not as great an offense when Congress has by enactment made silver dollars equal to gold dollars, for

the citizen by contract to refuse to use them as the currency of the country?

On June 30, 1864, greenbacks were worth in gold thirty-five cents on the dollar. On July 11, 1864, gold ruled the market in New York at 285½.

Silver dollars to-day have a legal-tender value of gold dollars. Dishonor them by refusing to lend greenbacks or silver on anything but upon the promise of gold in return, the gold dollar becomes enhanced in value as currency in ITS USE, and silver, useless and scorned loses this value as well as its designation as part of the integral currency of the United States, and is in clear violation of the Acts of Congress of 1891 and 1893, that gold and silver both in their use and value, shall be kept at a parity.

When Congress permits parties to make special contracts, it meant legal contracts—contracts not opposed to public policy, and it is plain that it never intended (as it never had the power) to trust the CURRENCY making power, with the creditor class, either of this country or at the center of capital, the merchant princes of Great Britain.

It is well said by Mr. Justice STRONG in the legal tender cases, 12 Wall., 549, 79 U. S., 311:

“Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government OVER the currency, whatever that power may be, and the obligations of the parties are, therefore, assumed with reference to that power.”

The Act of 1878 is to restore the legal tender character of the silver dollar.

President Hayes, in his veto message to Congress

pointed out the effect of this Act and yet it was passed over his veto.

This act makes gold and silver the legal tender currency of the country. Prior to this, gold was a legal tender, and fractional silver coins up to five dollars. The public policy of the country is to have BOTH a full legal tender.

The late presidential election was for BOTH, but not for an unlimited amount of free silver coinage.

The clause in the Act of 1878 saving to the citizen the right to receive something other than gold and silver "when expressly stipulated in the contract" was evidently intended so as not to unnecessarily interfere with the commerce and traffic of the country. It will be contended with some force that the Act only provides that gold and silver coin shall be a legal tender for the discharge of all debts and obligations unless otherwise expressly stipulated in the contract, and that the citizen was left perfectly free to make by express contract other currency a legal tender. If this is confined to the greenback currency, it is, no doubt, correct, for Congress has so provided; but that a citizen could by express stipulation make British or Spanish coin the currency with which to satisfy contracts to be performed in this country, as the customary money of the country, we deny.

It has also been the custom to make contracts for the delivery of goods, wares and merchandise which includes bullion of every description, and that the delivery of these according to the terms of the contract discharges the obligation, but this is mercantile exchange of products of commerce and trade, and in no way affects the currency. Any breach of these obligations must be

enforced by the courts, and its judgments are in currency, with this exception, that as to the metallic or paper currency, when so contracted for the court, may give judgment in kind. The Act of 1893, requires all judgments in the federal courts to be in dollars and cents. Congress has so provided,*not the citizen. It was then to preserve to the citizen his customary rights as a trader that he could by express contract make something other than gold and silver coin a medium of discharging his obligation, *i. e.*, greenbacks as currency, goods, wares and merchandise as property.

It is begging the question to say, that the act of 1878, declaring silver dollars a legal tender for all debts, made a provision in the act, that they should not be so where otherwise expressly stipulated in a contract.

Strip the act of all provisions and all declared intention to make gold or silver a legal tender, and let the act read direct and to the purpose,

"that there shall be coined at the several mints of the United States silver dollars of the weight of $412\frac{1}{2}$ grains Troy standard silver as provided in the act of 1837, which coins, together with all silver dollars heretofore coined, shall be a legal tender only in case they are made so by the private contract of citizens and foreigners in the United States."

Would not those who have studied the history of their country at the time when the foundations of the constitution were laid and imbibed its spirit, be shocked that after these immortal framers had so carefully guarded the power to coin money and regulate the value thereof, bestowing it exclusively upon the new Federal government, and in the same section prohibiting the several states from making anything but gold and silver legal tender, to find in the year 1878, or about a hundred years after the power

was bestowed, a Congress transferring this trust and confidence, a power and trust not assignable, to the citizen and to foreigners, to declare these coins of the United States mint not a legal tender if so provided in a contract?

It is an old maxim that the king can make the money, but it is the people who fix its value. What did this maxim mean? History tells us. It was not the people of the country whose king coined the money, but the people that rule the money market at the money center. This was, when the maxim sprung into life, at Holland; it is now at London. The American statesmen of 1792 well knew this, for it was in their own time this maxim was first uttered, hence in dealing with the legal tender question they were not neophytes, but the wisest, brightest, noblest of mankind. It was the people who founded the constitution whose rights the statesmen were preserving for all time, not for the plutocratic magnates of Amsterdam, Holland, London, or New York City, of the nineteenth or twentieth centuries.

It is Congress alone which is anointed with the power to regulate the currency, so far as it relates to the means of payment. While the Chicago convention of 1896 made it one of its declarations of political principles, that the demonetization of any kind of legal tender by private contract is unjust, oppressive; the proposition itself is pre-eminently a legal and constitutional one. While it is certain that 6,000,000 of the voters in the last presidential election voted for this proposition as a political canon for the guidance of Congress, it is not certain that the millions of citizens who voted against the unlimited coinage of silver, and of certain fineness, did not and would not have voted that silver, as it is now monetized by Congress un-

der the acts of 1879, 1890 and 1893, should be demonetized and decried by private contract.

CONGRESS CANNOT DELEGATE TO THE PEOPLE POWERS
CONFERRED UPON IT TO BE EXERCISED BY IT ONLY,
AND TO HAVE THE FORCE AND EFFECT OF GENERAL
LAWS.

Let it be supposed that the First Congress that met after establishing the constitution in providing, as they did, in the act of 1872 for a mint, had provided in the bill that gold and silver should be a legal tender leaving the money changers to make such express contracts as they pleased as to the currency. Would not those members of Congress, fresh from making the organic act which confided to the general government the implied power of making legal tender and denied to the several states the power to make anything else than gold AND silver a legal tender, have at once protested that that which had been so solemnly and expressly confided to Congress alone by the people should be redelegated and left to the cupidity of individuals to make what contracts they pleased as to the currency and thus regulate among themselves the value thereof?

"One of the settled maxims on constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority there it must remain, and by the constitutional agency alone, the law must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon

which the power shall be devolved, nor can it institute the judgment, wisdom and patriotism of *any other body* or be at the tender mercy of the cupidity, avarice or selfishness of any other body, for those to which alone the *people* have seen fit to confine the sovereign trust."

Cooley's Const. Limitations.

Locke on Civil Government, Par. 142.

There is not power to refer the adoption or rejection of a *general* law to the people of a state.

Congress is the only body clothed with power of general legislation. It possesses the entire power. The people reserved no part of it to themselves.

The government is a representative one, and in passing general laws the people act only through their representatives in Congress assembled. Congress cannot give the people the power as between themselves to establish a *currency* which shall be a legal tender. Gold and silver coin is the legal tender established by Congress, and it cannot be left to the people to establish any other medium.

Delegated authority cannot be re-delegated.

Broom's Legal Maxims, 839.

De Baril v. Campyr Pado, (Pa.) 7 Cent. Rep., 644.

Hill v. Canfield, 63 Pa., 77.

Harrell v. Wellington & W. R. Co., 106 N. C., 258.

Hence the power of the legislature cannot be re-delegated to the people themselves, except in matters of local concern.

State v. Pond, 12 West. Rep., 368; 93 Mo., 606.

Caldwell v. Barrett, 73 Ga., 604.

Cooley's Const. Limit., 5th Ed., 149.

Powers re-delegated to be strictly construed.

School v. Law Manual, 2 N. Eng. Rep., 547;
63 N. H., 547.

Gould v. Raymond, 59 N. H., 260.

The case of *Woodruff v. Miss.*, 162 U. S., 291, is relied upon and referred to by the learned gentlemen representing the defendant in error, for the enforcement of a contract payable in gold of a certain fineness. In that case, which was an appeal from the Supreme Court of Mississippi, which had decided that certain bonds were made payable in gold only, and were, under a construction given to an act of the legislature of the State of Mississippi, void, 16 Miss., 298.

The Supreme Court of the United States, however, held that by the terms of the bonds they were payable generally in the lawful money of the United States, and NOT IN GOLD. Judge Field in his dissenting opinion, expresses it HIS opinion that a contract payable in gold coin or currency, is not invalid, nor is any selection of one of a class of currency illegal, unless it is immoral in its character and detrimental to the general interests of society, *i. e.*, opposed to public policy. This was said after the Acts of 1891 and 1893. But the majority of the court declined to so decide, and simply contented itself in its opinion, by deciding the case upon the question presented to it, and that was a case like all the other cases heretofore quoted, where the contract required that the obligation of payment should be made in lawful money. Hence the question of a single standard created by contract did not arise.

This case was decided in the spring of 1896, and there has been no case of this character before the court since.

It is true that the cases of *Bronson v. Rhodes*, and *But-*

ler v. Horwitz, and cases *idem generis*, where the contract called for silver and gold (the only point presented to the court), the judges speak in the body of the several opinions, of gold and silver, sometimes conjunctively, and sometimes disjunctively, *i. e.*, "gold AND silver is the Legal Tender for the payment of debts," and again "gold OR silver is a legal tender for the payment of debts;" but when applied to the case before them, the language is referable only to the case of "gold AND silver."

The United States government, as we have seen, may in the absence of an Act of Congress discriminate between gold and silver and may issue bonds, payable in this country, in gold, and a private individual in this country, under well settled principles of law, may promise to pay, as they do in foreign bills of exchange, in the currency where the promise is to be performed, but citizens *inter sese* in cases of debts contracted in this country and payable in this country, cannot lawfully discriminate between the metals in the SAME class, when created by Congress as a legal tender.

In this Republic we have had two classes of money; gold and silver, a metallic class, and greenbacks, a paper class. The Supreme Court has decided that the Act of 1862, which authorized greenbacks to be a legal tender, was not intended by Congress, to prevent a private citizen from selecting the other class. But had Congress declared, as it now has in the case of gold and silver, that both metals should be kept at a parity, both in their use and value, then, the will of Congress could not be thwarted, by either the greed, want of confidence and demands of creditors, relegating one of the same class to "innocuous desuetude" and raising the other to the injury of the government sometimes to an unwarranted premium.

The government is the principal debtor in America in the money market of the world, and it is not to its interest that in payment of its debts it should be compelled to deal only in one of the factors which it has created for the payment of such debts. The government has always contended, that obligations payable in coin, may be satisfied by payment in either of the first class, gold or silver, or in both at its pleasure. Under the Act of January 14, 1875, Congress authorized the President to issue bonds, etc., but was industrious to provide that they should be made payable in coin, *i. e.*, gold and silver.

It is said that the honor of the nation is pledged that debts contracted to be paid in gold coin should be fulfilled to the letter. It might be said with equal force and propriety that every contract should be faithfully performed. This is but a platitude; but is, under Acts of 1890 and 1893, an undertaking to pay in gold dollars to the exclusion of silver ones, a contract? It is contrary to the public policy of the country that such an undertaking should constitute an agreement, then, it is not a lawful contract to so undertake. If Congress has said that gold and silver shall both be the metallic currency standard with which to satisfy debts and obligations, then public honor is not pledged to redeem these obligations in gold alone but in silver also. It has so said as to its own solemn obligations and declared its public policy under the act of 1875 by making its own obligations upon which it received gold, solvable in gold and silver.

* All undertakings, however innocent and harmless in themselves, must be governed by law. In most American states an undertaking made on Sunday is not a contract, because it is contrary to public policy of a christian country to make contracts on Sunday. Yet no one would sup-

pose that where individuals made such undertakings that the public honor was pledged for their fulfillment.

Such undertakings are not sacred and solemn, but are made in violation of law, and hence not contracts. It is said that a party who agrees to pay in gold dollars only ought not to plead that such is contrary to law. That it is pleading the "baby act." That higher regard must be paid to the contract than the public weal. The baby, while such, will turn with natural instincts to the parents and will disobey all law for them. The man will dissolve the ties of husband and father, parent and child at the interest of his country and in obedience to its laws. For it he will with decorum and propriety ardently lay down his life, which cancels all debts. The plea then, that an undertaking is contrary to the law of the land is not a "baby act," but a manly one. And this can never be a dishonest one.

The popular vote of the citizens of the United States at the last election amounted to 13,923,643 votes; 7,106,199 votes were cast for gold and silver as now established under the act of 1879, and 6,502,688 votes were cast for gold and a free coinage of silver. It cannot be possible that the conscience of 13,000,000 and upwards of the voting citizens of the United States sanctions and approves of a dishonest act. It must be presumed that they honestly believe in the way in which they voted—that gold and silver shall be the customary currency of the country.

If this is so, it is by no means certain, that a proposition to pay in gold and silver, *debts* contracted in this country to be paid in this country, is dishonest. Debts payable in another country in its currency are not unlawful because they do not affect the currency of the United States. There has been no declaration of Congress that

prohibits this. Here the honor of the individual and through him the state is pledged that he will keep his word.

"All creditors and debtors make their contracts with the notice that Congress may at any time change the existing laws as to legal tenders for the payment of debts, and that both would be governed by this change."

Therefore it could never be *contra bonos mores* for either to insist in observing the laws of the country, in the performance of contracts which are made subject to those laws, whatever they may be, at the time of performance.

Leaving the zone of the jurisprudence and crossing into the domain of moral politics with which it must always be cognate, it is by no means certain that in the observance of the laws, *individuals*, when considered as such contradistinguished from governmental relations, would be injuriously affected, or that one would gain an undue advantage of the other. At present there is no change in the law since these mortgages were made. Gold and silver currency of the United States are at a parity, and the material composing these has in no way been disturbed. If Congress, however, should authorize the issuance of a redundancy of silver currency under what is termed "free coinage," it is said that the silver dollar would have but a market value of one-half its present legal value, and with it debtors would be enabled to pay their debts at fifty cents on the dollar, and this would act injuriously and unjustly on the creditor, would be a dishonest act of the government and a soil on the public honor. This is but speculative.

If the creditor had nothing *but* silver dollars, and everything to buy, and the price of what he bought was

doubled, this statement might be blessed with some shadow of plausibility. If the debtor had nothing and wanted nothing except what he then had, this too might seem plausible. The creditor, however, may have other wealth which he desires to sell, and the debtor must buy of him, and while he gets but half the purchasing power with the debtor's money, he obtains double the value of that which he has to sell. The debtor pays twice as much for that which he has to buy, and as both have to sell what they have, and buy what they have not, the condition of things becomes equipollent, but with this law has nothing to do. It is for the people who are to be affected by these conditions of things to establish by their legislature what they deem best for the common weal. If the legislation is bad, as it affects all the people alike, they and not the courts will correct it.

That values are affected by changes does not prove that such changes are in themselves dishonest. The tariff in its fluctuations, is passed with an anticipation that the ultimate result of changing values of dutiable goods in this country, and enables those who have a stock on hand to profit by it, if the prices are raised, and those who require a stock, to pay higher prices, than those who already have such. Commerce, which is always democratic, nimbly adjusts itself to these fluctuations in value, but no merchant has a right to condemn the government as dishonest because his store is empty at the time the law goes into effect and his neighbor's is full.

The capitalist gains the benefit of having his coin doubled in value, the debtor his merchandisable property, just as the merchant who has a large stock of goods gains by an increased tariff. If neither debtor nor creditor has

gold, they are neither injured nor benefited by its increased value.

It is for the legislature to say, in the dealings of citizens *inter sese*, what kind and quantity of currency we shall have, and when it so declares, it is the duty of the court to enforce it without speculating as to the wisdom of such legislation.

In the case at bar, Congress has declared that gold and silver shall be the currency receivable at law, and neither individuals nor the courts can give the preference to one class of currency over the other.

Congress has declared that it is for the nation's welfare that it pay its own debts in gold and silver, or it is for the welfare of each of its citizens that they may now discharge all debts and obligations in a like medium of payment, and to discriminate against one of the agencies as currency in favor of another, is contrary to public policy, and will not be favored in a court of equity.

We earnestly press upon the court, that as a legal question, founded on public policy and sound constitutional considerations, the demurrer to this bill should be sustained, and that the bill be ordered dismissed for want of equity.

ROBERT RAE,
Solicitor for Plaintiffs in Error.

APPENDIX.

Robert Rae, Jr.,	}	Appeal from the Branch Appellate Court for the First District of Illinois.
<i>Appellant,</i>		
<i>vs.</i>		
Homestead Loan & Guarante tee Co.,		
<i>Appellee.</i>		

Mr. Justice PHILLIPS, after a brief statement of the facts, delivered the opinion of the court:

The elaborate and able argument for appellants cannot be considered on what appears from this record, as the decree does not find or require judgment in any particular kind of money, but finds a sum due in dollars and cents. Even if it were assumed that contracts of this character could not be sustained, still, by the final decree the appellants are not prejudiced,—they cannot be heard to complain in an appellate tribunal. If the character of money in which payment is contracted to be made be rejected from the contract, still the liability for payment in some kind of legal tender would exist, hence by the decree no prejudice resulted to appellants in overruling their demurrer.

The decree of the Branch Appellate Court for the First District is affirmed.

(Opinion reported in 178 Ill., 371.)